CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/16

In the matter between:

TSHIVHULANA ROYAL FAMILY Applicant

and

NDITSHENI NORMAN NETSHIVHULANA Respondent

Neutral citation:	*Tshivhulana Royal Family v Netshivhulana* [2016] ZACC 47
Coram:	Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J
Judgment:	Musi AJ
Heard on:	1 November 2016
Decided on:	14 December 2016
Summary:	Section 21 of the Traditional Leadership and Governance Framework Act — recognition of traditional headman — exhausting internal remedies — not applicable to disputes between Premier and traditional communities — remitted to the High Court to proceed in accordance with this judgment

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ORDER

On appeal from the High Court, Gauteng Division, Pretoria (functioning as the Limpopo Local Division, Thohoyandou) the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The order of the High Court, Gauteng Division, Pretoria (functioning as the Limpopo Local Division, Thohoyandou) is set aside and replaced with the following:
   "(a) The point *in limine* pertaining to the exhaustion of internal remedies is dismissed.
   (b) Costs are reserved for later adjudication."
5. The matter is remitted to the High Court to proceed in accordance with this judgment.
6. The respondent is ordered to pay the costs in this Court.

JUDGMENT

MUSI AJ (Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against an order of the High Court, Gauteng Division, Pretoria (functioning as the Limpopo Local Division, Thohoyandou) (High Court). The High Court held that in terms of the Promotion of Administrative Justice Act[1] (PAJA) the applicant (Tshivhulana Royal Family) had to exhaust the internal remedies prescribed in section 21 of the Traditional Leadership

[1] 3 of 2000.

and Governance Framework Act[2] (Framework Act) before approaching it with a review application. This judgment concerns that holding.

Facts

[2] The late Mr Rasilingwani Piet Netshivhulana was the headman of Tshivhulana Village. He died in 1976. During 1978, he was succeeded by his son, Mr Mugoidwa Mutheiwana Wilson Netshivhulana (deceased), who died on 8 September 1992.

[3] Immediately after the deceased's burial the Tshivhulana Royal Family convened a meeting and resolved that Mr Davhana Elias Mulaudzi, the deceased's brother, should be the acting headman. According to the Tshivhulana Royal Family, Mr Mulaudzi was appointed acting headman as the deceased died without an heir because he did not have a "dzekiso" wife or great wife.[3] The firstborn son of a dzekiso usually succeeds the headman.

[4] The respondent is the deceased's firstborn son and contends that he is the deceased's successor. He alleges that at the meeting where Mr Mulaudzi was identified as the acting headman, it was resolved that Mr Mulaudzi would be regent only until the respondent gets married. Although he was 24 years old at the time, he was regarded as a minor because he was still unmarried. The Tshivhulana Royal Family disputes this and alleges that he is not a child of a great wife and has no right to be the deceased's successor. It also alleges that the respondent does not have the personality and temperament to be a headman.

[5] The Tshivhulana Royal Family falls under the Netshimbupfe Royal Family, which is the Senior Traditional Royal House. During September 2012, some of the

[2] 41 of 2003.

[3] Only a male child birthed by a great wife qualifies to be an heir to the headman. In order to qualify as a "dzekiso" wife, a woman must have been married whilst a virgin, must be royalty and the bride wealth that married her should have come from the father of the headman.

deceased's children approached the Netshimbupfe Royal Family to enquire why Mr Mulaudzi was still acting headman after such a long time. On 31 October 2012, the Tshivhulana Royal Family received a letter from the Netshimbupfe Royal Family requesting the Tshivhulana Royal Family to identify the deceased's successor and to communicate its choice to it before the end of November 2012. This was, for various reasons, not done.

[6] The Tshivhulana Royal Family ultimately met on 21 December 2013 and identified Mr Oriel Netshivhulana, the respondent's younger brother, as the deceased's successor. He repudiated the designation. As a result, the Tshivhulana Royal Family met again on 23 December 2013 and identified Mr Mulaudzi as the headman of the Tshivhulana Village.

[7] Mr Mulaudzi's name was submitted to the Netshimbupfe Royal Council to be forwarded to the Member of the Executive Council, Limpopo Provincial Government responsible for Co-operative Governance, Human Settlement and Traditional Affairs (MEC) and the Premier of the Limpopo Province (Premier).

[8] The Netshimbupfe Royal Council wrote a letter to the Department of Co-operative Governance, Human Settlement and Traditional Affairs (Department) informing it of correspondence received from the Tshivhulana Royal Family indicating that Mr Mulaudzi should be recognised as the headman of Tshivhulana Village. It further informed the Department that it held a meeting on 26 January 2014 and resolved, contrary to the Tshivhulana Royal Family's election, that the respondent should be recognised as the headman of Tshivhulana Village.

[9] On 5 May 2014, the Premier withdrew the recognition of Mr Mulaudzi as acting headman and recognised the respondent as the headman of Tshivhulana Village. The Tshivhulana Royal Family, aggrieved, approached the High Court with an application to review and set aside the decision of the Premier.

Litigation history

[10] The respondents in the High Court were Mr Nditsheni Norman Netshivhulana (first respondent), the Premier (second respondent), the MEC (third respondent), the Netshimbupfe Traditional Council (fourth respondent) and the Netshimbupfe Royal Council (fifth respondent). Only the first respondent, who is the respondent in this Court, opposed the application.

[11] It was common cause that the review application was to be adjudicated in terms of PAJA. It was also common cause that the Tshivhulana Royal Family was obliged to exhaust internal remedies, if any, before approaching the Court, unless there were exceptional circumstances.[4]

[12] The respondent took two points *in limine*. First, he contended that Mr Mulaudzi had a direct and substantial interest in the matter and requested the Court to order his joinder as an applicant. Second, he contended that the Tshivhulana Royal Family failed to exhaust the internal remedies set out in section 21 of the Framework Act.

[13] The High Court found that Mr Mulaudzi was not an "interested party" because the issue before it was not about him demanding to be recognised. According to the High Court, the issue that fell to be adjudicated was the total disregard for the customary practice and manner in which a headman should be appointed.

[14] The High Court opined that the issues in the review application could be resolved by means of any of the internal remedies prescribed in section 21 of the Framework Act. It held that the Tshivhulana Royal Family had not exhausted those internal remedies. It further held that there were no exceptional circumstances that warranted non-compliance with the internal remedies.

[4] The importance of and the need for the exhaustion of internal remedies has, amongst others, been discussed in *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at paras 34-40 and *Nichol v Registrar of Pension Funds* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) at paras 15-8.

[15] It dismissed the first point *in limine* but upheld the second and dismissed the application. The Tshivhulana Royal Family, dissatisfied with the order, applied for leave to appeal against the part of the order which upheld the second point *in limine*. The High Court refused leave to appeal with costs. The Tshivhulana Royal Family unsuccessfully approached the Supreme Court of Appeal (SCA) for leave to appeal.

This Court

[16] On 1 November 2016, when the matter was before us for oral argument, this Court made an agreement of the parties an order of Court.[5] In terms of that order, the only issue to be determined by this Court is the second point *in limine*, to be decided on the papers filed with the Court, without an oral hearing.[6] The parties focussed only on the main contentious issue. There are however other issues that ought to be determined by this Court.

[17] The issues to be determined are:

1. Whether the late filing of the application should be condoned.
2. Whether leave to appeal should be granted.
3. Whether section 21 of the Framework Act is applicable.
4. If it is, whether the Tshivhulana Royal Family has established exceptional circumstances to exempt it from exhausting the internal remedies prescribed in section 21.
5. Costs.

[5] Owing to certain developments on the day of the hearing the parties agreed to proceed as set out.

[6] The relevant part of the order reads as follows:

> "1. The matter is postponed subject to paragraph two (2) below.
>
> 2. The only issue to be determined by the Court is the second point *in limine* dealt with by the Court below, to be decided on the papers filed with the Court and without an oral hearing.
>
> 3. The respondent tenders the costs occasioned by the postponement including the costs of senior counsel only."

Legislative framework

[18] It is apposite to start off by setting out the statutory framework within which the issues should be determined. The procedure for filling a vacancy of a headman and the recognition of headmen in Limpopo is governed by section 12 of the Limpopo Traditional Leadership and Institutions Act[7] (Limpopo Act). Section 12 provides:

> "Recognition of senior traditional leader, headman or headwoman:
>
> (1) Whenever a position of a senior traditional leader, headman or headwoman is to be filled—
>
> (a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned—
>
> (i) identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and
>
> (ii) through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.
>
> (b) the Premier must, subject to subsection (2)—
>
> (i) by notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;
>
> (ii) issue a certificate of recognition to the person so recognised; and
>
> (iii) inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman."[8]

[7] 6 of 2005.

[8] Although section 12 of the Limpopo Act contains more detail, it is in effect similar to section 11 of the Framework Act.

[19] It is common cause that the Premier's action constituted an administrative action.[9] Section 7(2) of PAJA provides as follows:

> "(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[20] Section 21 of the Framework Act provides:

> "(1)(a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.
>
> (b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.
>
> (2)(a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.
>
> (b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be

[9] The exact grounds of review are not relevant for purposes of this judgment.

referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted—

(i) the parties to the dispute or claim; and

(ii) the provincial house of traditional leaders concerned.

(c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.

(3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission."

I turn to deal with the issues.

Condonation

[21] The SCA dismissed the Tshivhulana Royal Family's petition on 3 February 2016. The notice of the Court's Registrar notifying the Tshivhulana Royal Family of the dismissal of the petition is dated 5 February 2016. The Tshivhulana Royal Family was supposed to file this application on or before 24 February 2016.[10]

[22] According to the Tshivhulana Royal Family, its Bloemfontein attorneys received the order of the SCA only on 10 February 2016. It was relayed and received by its Venda attorneys on 11 February 2016.

[23] After considering its options the Tshivhulana Royal Family resolved, on 16 February 2016, to approach this Court with an application for leave to appeal. Senior counsel could not deal with the matter expeditiously because he and other members of the Pretoria Bar relocated to new chambers in an incomplete building, which caused substantial disruptions for counsel. The application was served on the Registrar of the High Court on 25 February 2016 and on the Registrar of the SCA on 29 February 2016.

[10] In terms of rule 19(2) of this Court's Rules the application should have been filed within 15 days after the order of the SCA.

[24] The delay is not long. The explanation is reasonable. The application is unopposed. The prospects of success are good. It is in the interests of justice to grant condonation.

Leave to appeal

[25] Section 167(3)(b) of the Constitution contains the threshold requirements for granting leave to appeal in this Court.[11] It must also be in the interests of justice to grant leave. Whether it is in the interests of justice to grant leave depends on a careful and balanced weighing-up of all relevant factors including the prospects of success.[12]

[26] The matter raises a constitutional issue relating to the recognition of traditional leaders in terms of the Framework Act that was passed to give effect to section 211 of the Constitution.[13] In *Sigcau*[14] this Court said:

> "The institution of traditional leadership and the determination of who should hold positions of traditional leadership have important constitutional dimensions."[15]

[11] Section 167(3)(b)(i) and (ii) reads as follows:

> "The Constitutional Court—
>
> . . .
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[12] *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 15; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[13] Section 211 of the Constitution reads:

> "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
>
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
>
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

See also *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* [2014] ZACC 36; 2015 (3) BCLR 268 (CC) at para 38.

[14] *Sigcau v President of the Republic of South Africa* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC).

[27] The question whether the internal remedies prescribed by section 21 of the Framework Act should first be exhausted before a decision of the Premier to recognise a traditional leader is taken on review, in terms of PAJA, raises an arguable point of law of general public importance which ought to be considered by this Court. It is not the first time that this issue receives the attention of our High Courts.[16] Many South Africans in rural and peri-urban areas are governed by traditional leaders. It is in the interests of justice that disputes pertaining to traditional leadership be resolved with certainty and clarity in order to maintain stability. Leave to appeal should be granted.

Applicability of section 21

[28] The Tshivhulana Royal Family also contends that the review application concerns a dispute between the Tshivhulana Royal Family and the Premier and not a dispute within or between traditional communities or other customary institutions. Therefore, it contends that section 21 of the Framework Act does not apply.

[29] The respondent contends that the Tshivhulana Royal Family failed to exhaust the internal remedies prescribed in section 21 of the Framework Act. He contends that the dispute is one that falls squarely within the purview of disputes described in section 21(1)(a) of the Framework Act.

Interpretative approach

[30] In *Cool Ideas,*[17] this Court summarised the principles of statutory interpretation as follows:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an

[15] Id at para 15.

[16] *Mamogale v Premier, North West* [2006] ZANWHC 63.

[17] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution."[18]

Where a word is defined in a statute, the meaning assigned to it by the Legislature must prevail over its ordinary meaning.[19]

Architecture of section 21

[31] Section 21 of the Framework Act prescribes the procedure to follow for the resolution of a dispute or claim concerning customary law or customs arising from the implementation of the Framework Act. In terms of section 21(1)(a), members of the traditional community and the traditional leaders of the community must attempt to resolve the dispute. In terms of section 21(2), if the dispute is not resolved by the traditional community and its leaders it must be referred to the provincial house of traditional leaders (house) which must seek to resolve the dispute with its internal rules and procedures.[20] If the house cannot resolve the dispute, it must be referred to the Premier who must resolve the dispute after consulting the parties to the dispute and the house.[21] If the dispute cannot be resolved by the Premier or the house it must be referred to the Commission.[22]

[32] The dispute may be referred from one level to the next only if it is unresolved. When a definitive decision is taken at any level, the aggrieved party does not have any further internal recourse. This is so because none of the levels is a review or appeal

[18] Id at para 28. See also *Natal Joint Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[19] *Minister of Defense and Military Veterans v Thomas* [2015] ZACC 26; 2016 (1) SA 103 (CC); 2015 (10) BCLR 1172 (CC) at para 20.

[20] Section 21(2)(a).

[21] Section 21(2)(b).

[22] Section 21(2)(c).

level. A decision at any level gives the aggrieved party the right to exit the internal structure and approach a court for appropriate relief.

[33] In terms of section 25(5)[23] the Commission may only deal with disputes or claims that were submitted to it within six months after Chapter 6[24] came into operation. This dispute arose on 5 May 2014. Chapter 6 came into operation on 1 February 2010. The Commission would therefore not have jurisdiction to resolve this dispute.

Analysis

[34] Some of the composite parts of section 21(1)(a) are defined in section 1 of the Framework Act. Customary institutions or structures are defined as those institutions or structures established in terms of customary law. A traditional community is defined as a traditional community recognised as such in terms of section 2.[25]

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[23] Section 25(5) reads:

> "Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this Chapter may not be dealt with by the Commission."

[24] Chapter 6 consists of sections 21 to 26A.

[25] Section 2 reads as follows:

> "(1) A community may be recognised as a traditional community, if it—
>
> (a) is subject to a system of traditional leadership in terms of that community's customs; and
>
> (b) observes a system of customary law.
>
> (2) (a) The Premier of a province may, by notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community concerned, and, if applicable, the king or queen under whose authority that community would fall, recognise a community envisaged in subsection (1) as a traditional community.
>
> (b) Provincial legislation referred to in paragraph (a) must—
>
> (i) provide for a process that will allow for reasonably adequate consultation with the community concerned; and
>
> (ii) prescribe a fixed period within which the Premier of the province concerned must reach a decision regarding the recognition of a community envisaged in subsection (1) as a traditional community.
>
> (3) A traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by—
>
> (a) preventing unfair discrimination;

[35] The dispute or claim that should be subjected to the internal remedies prescribed in section 21 must be one *between* or *within* traditional communities or customary institutions as defined in the Framework Act.

[36] It is the Court's duty to ascertain the real or true nature of the dispute between the parties.[26] In conducting the inquiry the Court must look at the substance of the dispute.[27] The Court would have regard to various factors including the pleadings, the facts and the relief sought. The characterisation of a dispute by a party is not necessarily conclusive.[28] Ascertaining the true nature of the dispute would assist to determine whether the dispute is within or between a traditional community and a customary institution.

[37] Although one of the underlying disputes concerns the disagreement between the Tshivhulana Royal Family and the Netshimbupfe Royal Family as to who should be the headman of Tshivhulana Village, the Tshivhulana Royal Family presented the dispute in the High Court as the unlawful or irregular recognition of the respondent by the Premier.

[38] The review application is against the decision of the Premier. The primary relief sought is to review and set aside the Premier's administrative action of recognising the respondent as the headman of Tshivhulana Village. The dispute is between the Tshivhulana Royal Family and the Premier. The Premier is not a traditional community or customary institution. The fact that the Premier failed,

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(b) promoting equality; and

(c) seeking to progressively advance gender representation in the succession to traditional leadership positions."

[26] *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 52; *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union (1)* (1998) 19 *ILJ* 260 (LAC) (*Fidelity*) *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building Workers Union (2)* (1997) 18 *ILJ* 671 (LAC) (*Ceramic*).

[27] *Fidelity* id at 269G-H.

[28] *Ceramic* above n 26 at 677H-I and 678A-C.

neglected or chose not to respond to the application also does not alter the nature of the dispute. It happens frequently in our courts that defendants or respondents do not oppose matters. Their failure or neglect, as a matter of course, leads to default judgments being granted against them.

[39] The fact that a party is joined because it has a direct and substantial interest in the subject matter of the dispute does not change the true nature of the dispute. All that it means is that that party's right may be affected, prejudicially, by the Court's order.[29] The interested party is given an opportunity to defend the right if he or she so wishes. The respondent was cited as an interested party.

[40] It is highly unlikely that the Legislature would have contemplated a dispute between the Premier and a traditional community or a customary institution to fall within the purview of section 21(1)(a) of the Framework Act. This is so because the Premier is part of the internal dispute resolution institutions or persons in section 21.[30] It would be absurd to have the Premier simultaneously as a party to and resolver of the dispute. In recognition disputes, the Premier's decision would invariably be impugned because he or she is the recognising authority. Having decided the issue, he or she would be disqualified to resolve the dispute about his or her alleged unlawful conduct.

[41] The removal of a headman is governed by section 12 of the Framework Act.[31] In terms of section 12, the royal family may request the Premier to remove a headman

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[29] *Bowring NO v Vrededorp Properties CC* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) at para 21.

[30] See section 21(2)(b) of the Framework Act at [20].

[31] Section 12 of the Framework Act provides:

> "(1) A senior traditional leader, headman or headwoman may be removed from office on the grounds of—
>
> (a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
>
> (b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such;
>
> (c) wrongful appointment or recognition; or

on the grounds listed in section 12(1)(a), (b) and (d). The royal family may however not request the removal of a headman on the ground of wrongful appointment or recognition. The Framework Act does not prescribe a procedure for the removal of a headman on the ground of wrongful appointment or recognition.

[42] The Framework Act gives the Premier the exclusive power to recognise a headman. He or she does not have the power to remove a headman on the ground of wrongful appointment or recognition. The reason why the Premier is not reposed with this power must be because that would give rise to a conflict. It would be the appointment action that is impugned. All recognition disputes would therefore involve the Premier. The Legislature recognises, by implication, that the Premier may not revoke or review an earlier decision because he or she would be *functus officio* (having discharged his or her office).

[43] It would be absurd and senseless to disqualify the Premier from reviewing his own decision for purposes of section 12(2) but not for dispute resolution purposes in terms of section 21. The interpretation that the section 21 dispute resolution remedies

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(d) a transgression of a customary rule or principle that warrants removal.

(2) Whenever any of the grounds referred to in subsection (1)(a), (b) and (d) come to the attention of the royal family and the royal family decides to remove a senior traditional leader, headman or headwoman, the royal family concerned must, within a reasonable time and through the relevant customary structure—

(a) inform the Premier of the province concerned of the particulars of the senior traditional leader, headman or headwoman to be removed from office; and

(b) furnish reasons for such removal.

(3) Where it has been decided to remove a senior traditional leader, headman or headwoman in terms of subsection (2), the Premier of the province concerned must, in terms of applicable provincial legislation—

(a) withdraw the certificate of recognition with effect from the date of removal;

(b) publish a notice with particulars of the removed senior traditional leader, headman or headwoman in the Provincial Gazette; and

(c) inform the royal family concerned, the removed senior traditional leader, headman or headwoman, and the provincial house of traditional leaders concerned, of such removal.

(4) Where a senior traditional leader, headman or headwoman is removed from office, a successor in line with customs may assume the position, role and responsibilities, subject to section 11."

are not applicable when the Premier's action is challenged is consonant with his or her implied disqualification in section 12.

[44] In *Mamogale*,[32] Mogoeng JP remarked:

> "The Premier of this Province has pronounced herself on the removal of the applicant as regent of the Bakwena Ba Mogopa tribe and on the recognition of the second respondent as his replacement. This decision has elevated what once was an internal dispute, potentially capable of internal resolution, to a dispute between a faction of the Royal Family as well as a section of the tribe on the one hand, and the Provincial Government on the other, which has caused the resolution to no longer be internal. A truly internal dispute is, in the context of this case, capable of being resolved by the Royal Family through customary laws, customs and processes. On the contrary, a Premier who has already pronounced himself or herself on a matter, cannot be summoned to a meeting of the Royal Family or of the tribe for the purpose of attempting to find any internal solution envisaged by section 21(1)(a). Accordingly, once the Premier takes a decision, the dispute loses every semblance of being internal. It follows that section 7(2) of PAJA does not apply to this case. After the Premier decided on the dispute, it was open to the applicant to bring this application to this Court which clearly has the jurisdiction to entertain it."[33]

[45] The respondent sought to distinguish *Mamogale* on three bases. First, that the issues in *Mamogale* were, in addition to section 21 of the Framework Act, also regulated by the Bophuthatswana Traditional Authorities Act.[34] Second, that *Mamogale* was about alleged misconduct rather than about who should rightfully be recognised as the headman. Third that this case is not about the establishment of a headmanship but about the recognition of a specific person as a headman.

[46] In *Mamogale*, the Court specifically dealt with section 21 of the Framework Act. The fact that Bophuthatswana has its own Act is irrelevant. The

[32] See *Mamogale* above n 16.

[33] Id at paras 19-20.

[34] 23 of 1978.

Framework Act creates a framework within which provinces may regulate traditional affairs. *Mamogale* relates to allegations of poor leadership and maladministration against Mr Mamogale. The crux of the matter was, however, the removal from office of Mr Mamogale by the Premier. It therefore dealt with the exercise of administrative action by the Premier, as in this case. *Mamogale* was concerned, like this case, with the removal of one person and the recognition of another, by the Premier. The order in *Mamogale* makes this plain. It reads in relevant part:

> "(b) the decision of the Premier to relieve the Applicant of his position as regent with effect from 31 October 2005 is reviewed and set aside;
> (c) the decision of the Premier to recognise the second Respondent with effect from 01 November 2005 is reviewed and set aside;
> (d) the Applicant is reinstated as regent of the Bakwena Ba Mogopa tribe."

The attempt at distinguishing *Mamogale* is thus flawed.

[47] The prescribed dispute resolution mechanism culminates with the decision of the Premier. There is no other dispute resolution level above the Premier. No internal appeal or review procedure against the Premier's decision is prescribed. Neither the Framework Act nor the Limpopo Act makes provision for the Premier to review his or her own decision. There is therefore no internal remedy that the Tshivhulana Royal Family could have utilised.

Conclusion

[48] The dispute before the High Court was not a dispute as envisaged by section 21. It is clear from the pleadings, facts and relief sought in the High Court that the Tshivhulana Royal Family endeavoured to undo the Premier's decision. Furthermore, even if it was a dispute as envisaged by section 21, there is no internal remedy that the Tshivhulana Royal Family had to exhaust in terms of that section. The High Court should have dismissed the second point *in limine* too. The High Court did not consider the merits of the review application. This matter should be remitted to the High Court for it to deal with the merits.

Costs

[49] There is no reason why the costs in this Court should not follow the result.

Order

[50] I make the following order:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The order of the High Court, Gauteng Division, Pretoria (functioning as the Limpopo Local Division, Thohoyandou) is set aside and replaced with the following:
   "(a) The point *in limine* pertaining to the exhaustion of internal remedies is dismissed.
   (b) Costs are reserved for later adjudication."
5. The matter is remitted to the High Court to proceed in accordance with this judgment.
6. The respondent is ordered to pay the costs in this Court.

For the Applicant:	R J Raath SC and U B Makuya instructed by Mathivha Attorneys
For the Respondent:	Anton Ramaano Inc